BONG NYUK LAN

v.

KAMARUDDIN & PARTNERS

HIGH COURT MALAYA, MALACCA
MOKHTAR SIDIN JC
[CIVIL APPEAL NO. 12-3/1988]
23 JANUARY 1990

LEGAL PROFESSION: *Negligence - Housing loan - Whether solicitor as stakeholder owes a duty of reasonable skill and diligence - Whether it is desirable for solicitors to act for both vendor and purchaser.*

The plaintiff signed a sale and purchase agreement to purchase a single-storey house from the second defendant on 15 March 1984 and paid RM7,000 as deposit. The plaintiff was advised to apply for a loan from the Government to complete the loan, which she did. The loan was approved six months later. In due course a cheque was issued for RM24,520 in the name of the first defendant. From this amount, a sum representing 10% of the purchase price was refunded to the plaintiff, and the balance (less legal fees) was released by the first defendant to the vendor (second defendant).

Subsequently, the plaintiff was informed that the housing unit allotted to her was to be changed to a medium cost single-storey house, which affected a price change. She did not agree to the change and refused to go on with the contract. The second defendant agreed to terminate the contract and refund the plaintiff's money if she would agree to pay 1% of the purchase price, which she refused.

The plaintiff claimed that the first defendant was in breach of their duty of skill and care to safeguard the plaintiff's rights and to advise the plaintiff to obtain independent legal advice. The plaintiff also claimed against the second defendant for a refund of RM24,520 and interest. The President of the Sessions Court dismissed the plaintiff's claim against the first defendant but allowed the claim against the second defendant together with interest. The plaintiff appealed against the decision of the Court dismissing her claim against the first defendant.

Held:

[1] It is clear that the money was remitted by the first defendant to the vendor before the loan agreement and deed of assignment was signed by the relevant parties.

[2] The Sessions Court Judge was right in giving judgment to the appellant against the second defendant only and not against the respondent because the money was and is still with the second defendant.

[3] It is undesirable for a solicitor to act for both the vendor and the purchaser but it is not negligence. At the most a complaint could be lodged against the solicitor with the Bar Committee or the Bar Council.

[4] The respondent was not negligent in releasing the money to the second defendant; he would have been negligent if he had retained the money.

[Appeal dismissed.]

Case referred to:

Cheng Fook Shen v. Tan Suan Sim [1980] 1 MLJ 105

For the appellant - Thara Singh; M/s. Thara Singh Sidhu
For the respondent - G. Krishnan; M/s. Krishnan & Co.

JUDGMENT

Mokhtar Sidin JC:

This is an appeal by the plaintiff, Bong Nyuk Lan, against the decision of the learned Sessions Court Judge who had dismissed the claim by the plaintiff against the 1st defendant. The plaintiff's claim against the defendants' is for the refund of the sum of RM24,520. The plaintiff alleged that she was asked by one Miss Yeoh to go to the office of the 1st defendant for legal advice in respect of the purchase of a single storey-terrace house from the 2nd defendant. It was agreed between the parties that the 1st defendant acted as solicitors for the plaintiff in respect of the sale and purchase agreement as well as for the execution of the necessary documents for the plaintiff to get a government loan for the purchase of the said house. It is pertinent to point out here that the 1st defendant was also acting for the 2nd defendant as vendor for the said property. Thus the 1st defendant was acting for both the plaintiff and the 2nd defendant.

The facts as can be seen from the statement are that one Tee Ah Swee, the husband of the plaintiff made an application on 18 July 1981 to purchase a single storey house from the 2nd defendant. Together with the application a deposit of RM1,000 was advanced. On 11 June 1983 the said Tee Ah Swee was advised by the 2nd defendant that he was successful in his application and Lot No. 300(c) (which was later changed to No. 500(c)) was allocated to him. On 25 July 1983 with the consent of the 2nd defendant the said Tee Ah Swee transferred the booking to the plaintiff. On 14 January 1984 the 2nd defendant forwarded a letter of offer to the plaintiff requesting among other things to pay the 10% deposit for the house. Also enclosed was a form relating to schedule of payments. The plaintiff accepted the offer on 21 January 1984 and paid the balance to make up the deposit of RM7,000. The sale and purchase agreement was only signed by the plaintiff on 15 March 1984. The plaintiff was advised to apply for loan to pay the sum required as progress payments when the building of the house commenced. The plaintiff did apply for the loan which was approved some six months later. When the loan was approved the plaintiff got a cheque which was in the name of Messrs. Kamaruddin & Partners (1st defendant). She handed the cheque for the sum of RM24,520 to the defendant. The loan taken was from the government. The 1st defendant then refunded the sum of RM6,706 being 10% of the purchase price to the plaintiff being the refund of deposit paid earlier by the plaintiff. A sum of RM17,224 of the sum of RM24,520 was forwarded to the developer (2nd defendant). The balance of RM590 was retained by the 1st defendant as legal fees.

Subsequently, the plaintiff received a letter from the 1st defendant stating that the unit allotted to the plaintiff is to be amended to a medium cost single-storey house with certain changes involving the pricing of the unit as well. On receiving that letter the plaintiff went to the office of the 2nd defendant, expressing her disagreement with the changes and her refusal to go on with the contract. The 2nd defendant agreed with the plaintiff to terminate the contract and refund if she pays 1% of the purchase price. The plaintiff refused to pay the 1% and hence the present appeal.

The claim by the plaintiff against the 1st defendant was that the 1st defendant was in breach of their undertaking and thereby caused loss and damage to the plaintiff in that:

(a) Being a stakeholder for the plaintiff, the 1st defendant contracted to use reasonable skill and diligence in the performance of their duties in that they undertook to protect the interest of the plaintiff but violated their sacred duties and wrongfully/negligently without the plaintiff's authority/consent released the said sum of RM24,520 to the 2nd defendant for whom the 1st defendant have been the solicitors from the inception of the project.

(b) Failed to assist the plaintiff to safeguard all the plaintiff's rights in the matter.

(c) Failed to advise the plaintiff to obtain independent legal advice.

(d) Charged the plaintiff sums as fees for which the 1st defendant was not entitled to.

Though several claims and grounds were put up by the plaintiff against the 2nd defendant, the gist of the claim against the 2nd defendant and the 1st defendant was for the refund of RM24,520 and interest at the rate of 8% per annum from the date of judgment to date of repayment or realisation.

In her decision the learned Sessions Court Judge dismissed the plaintiff's claim against the 1st defendant, but allowed the plaintiff's claim against the 2nd defendant for the sum of RM24,520 together with interest at the rate of 8% per annum from the date of judgment to date of payment.

Being dissatisfied with the decision of the learned Sessions Court Judge for dismissing her claim against the 1st defendant, the plaintiff appealed to this Court. No appeal either by the plaintiff or the 2nd defendant on the order made against the 2nd defendant. Thus the present appeal is against the decision of the learned Sessions Court Judge in dismissing the claim of the plaintiff against the 1st defendant.

From the evidence it is clear that the sum of RM24,520 was already forwarded to the 2nd defendant by the 1st defendant as soon as they received the money from the plaintiff. The 1st defendant retained only RM590 being legal fees for work done. It is not clear whether the claim of RM24,520 by the plaintiff includes the legal fees already paid.

On appeal it was submitted by the appellant's Counsel that the 1st defendant (respondent here) while acting for both parties took upon himself to announce to the appellant that a new house for RM42,500 would be built and if the appellant liked it she can have it but she must give her reply within a week. Counsel said this was an option which the appellant refused. That was the reason why she asked for the refund which was refused unless she agreed to pay the 1% of the purchase price to the 2nd defendant. From the evidence adduced in the Lower Court it was clear that the 1st defendant was only acting on the instructions of the 2nd defendant to offer the amended house to the plaintiff. On receiving that letter the appellant went straight to the 2nd defendant where she asked for the refund of the amount already paid by her to the 2nd defendant. The 2nd defendant refused the refund unless she agreed to 1% of the purchase price. It is clear from the evidence that the respondent only despatched the letter but did not participate in the negotiation for the refund. It is alleged by the appellant that the respondent was negligent in not advising her and completely threw the interests of the appellant.

Let me try to put the case in the proper perspective. There are two parts of the story in the present case. The first part is when the plaintiff accepted to purchase a house from the 2nd defendant whereby the respondent was acting for the 2nd defendant as well as the appellant. The respondent also acted for the appellant in drawing and executing the agreement. The respondent also acted for the appellant in applying for the loan which was successful. In fact the whole deal was concluded by them. It seems there is no complaint against the respondent. From the evidence it is clear that the appellant has no objection to the legal fees of RM590 collected by the respondent. The second part of the story began when the 2nd defendant found difficulty to finish the project whereby it decided to amend the construction of buildings to one of medium cost houses which was offered to the appellant which she refused to accept. It appears that the respondent was still acting for the 1st

defendant when it sent the letter of offer to the appellant on the instruction of the 2nd defendant. There was no evidence adduced in Court below that the respondent was then still acting for the appellant instead there is evidence to the contrary - where the appellant herself admitted that on receiving the letter from the respondent, instead of going to the respondent to ask for further information or advice she went straight to the 2nd defendant and demanded the refund of the money paid. In her evidence the appellant said this:

> ... Yes, I did receive a letter from M/s. Kamaruddin & Co., regarding the material changes to the house. The letter was dated 17 January 1985. I disagree with those changes. I did go to the developer's office because of these changes. At the time, not even a pole was up at the construction site. I told the developer that I do not want to carry on with the agreement and he agreed. He then asked to pay 1% interest. I refused. I then instructed my solicitors to take the necessary proceedings.

At that stage she knew that the money was already being transmitted by the respondent to the 2nd defendant when she said in cross-examination:

> ... I disagree that the money can be released to the developer after signing of the deed of assignment. I did not know when the lawyer sent the money to the developer.

Further the respondent gave evidence as follows:

> The RM24,000 was remitted to the developer on 14 August 1984. The loan agreement and deed of assignment was signed on 30 July 1984. 22 August 1984 was the date on which the Government signed. The date on the loan agreement and the deed of assignment is 22 August 1984. On the face of the documents, I agree that the money was paid before signing the documents ...

Earlier the respondent said:

> As far as I am concerned, I have no knowledge of the refusal. We have asked her to come several times to sign several documents. She did not come to sign any documents. I think she did that because she had some problems with the developer and she wanted to resolve those problems.

Thus, from the evidence it is clear that at that stage, the appellant knew that the money concerned was not with the respondent anymore but with the 2nd defendant and the fact that she treated the respondent was not acting for her anymore because instead of seeking the respondent's advise on the change she went to see the 2nd defendant directly. Let me pause here and see what are the prayers asked for by the appellant. The appellant in the statement of claim prayed for the following:

(a) the refund of RM24,520;

(b) interest at the rate of 8% per annum from the date of judgment to date of payment or realisation;

(c) such further orders the Court may deem necessary; and

(d) costs on a solicitor and client basis or its equivalent.

It can be seen from the prayers that the appellant is only seeking the refund of the money paid. There is no prayer asking for damages due to negligence of the respondent. As it stands the evidence is so clear that the appellant knew that the money claimed was and is with the 2nd defendant from the time the respondent transmitted it to the 2nd defendant and not in the hand of the respondent at all. In my view the learned Sessions Court Judge was right in giving judgment to the appellant against the 2nd defendant only and not against the respondent. For that reason I am dismissing the appeal against the respondent.

That be so it is better for me to deal briefly with the submission by the Counsel for the appellant on the negligence of the respondent which appears to me the main complaint and issue in this appeal. This was also brought up during the trial in the Sessions Court. In her judgment the learned Sessions Court Judge said:

> From the evidence it appears that a lot of allegations and insinuations were made with regard to the role played by the 1st defendant, particularly in his capacity as solicitor for both the plaintiff and the 2nd defendant (i.e., the purchaser and the vendor in the sale and purchase agreement). In my opinion, the issues that have arisen from this role of the 1st defendant is clearly unconnected and irrelevant for the purpose of deciding the claim before me.

The same issues were raised before me on appeal. First of all, I agree with the learned Sessions Court Judge that the issue of negligence is totally unconnected and not relevant to the claim by the appellant. Since the issue of negligence had been raised let me determine whether there was negligence on the part of the respondent. Counsel for the appellant contended that the respondent was negligent when he acted for both the purchaser and the vendor. He cited the case of *Cheng Fook Shen v. Tan Suan Sim* [1980] 1 MLJ 105 where Gunn Chit Tuan J (as he was then) said at p. 106:

> It must be pointed out at this stage that the Federal Court has in its recent judgment on *Ong Kim Khoon v. Gaya Filem Berhad* referred to the undesirability of the same solicitor acting for both vendor and purchaser. In that case, their Lordships referred to the view of Bray CJ in *Jennings v. Zihari Kiss* that "it is not only undesirable but wrong, whether the adviser in question is a solicitor or a land agent. It is impossible for the same person to give satisfactory service as the confidential and expert adviser of both parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in the position where he must be false to one and possible to both ..."

It is clear that what was stated was undesirable but does not tantamount to negligence. I agree with the view of the learned Judge that it is undesirable for a solicitor to act for both the vendor and the purchaser as happened in this case but it is not negligence. At the most as pointed by me during the hearing of the appeal that a complaint could be lodged by the appellant Counsel to the Bar Committee or Bar Council. In the present case it is clear from the evidence that the respondent was acting for both the appellant and the 2nd defendant in the sale and purchase agreement. The respondent acted for the appellant to get a government loan to pay the 2nd defendant. This was done and all was completed. In fact the money obtained from the government loan was paid by the respondent to the 2nd defendant on behalf of the appellant. All parties were happy and contented up to that stage. In fact the evidence shows that up to the stage the respondent had acted diligently for both parties. Everything had been concluded then. Therefore there was negligence on the part of the respondent and the appellant had no complaint against the respondent. In my view once the agreement had been concluded the respondent ceased to act for the appellant since there was nothing more to be done and the legal fees had been paid by the appellant and collected by the respondent. In my view the term of reference for the respondent to the appellant had been concluded. If the appellant wanted the respondent to continue to act for her fresh instructions must be given. Up to that stage there was no complaint of negligence by the appellant.

The problem started when the respondent wrote on behalf of the 2nd defendant to the appellant as to the amendment of the building plan from a high cost to a medium cost building and asking for her option. On receiving that letter the appellant instead of going to see the respondent for advice, went straight to the 2nd defendant and demanded the refund. She did not go and see the respondent at all even after that. Had she gone to see the respondent

for advice, it could be inferred that the respondent was still acting for her. That was not so. Of the refusal of the 2nd defendant for refund unless 1% payment of the total purchase price is made the appellant now alleged that the respondent was negligent in acting for both in the former transaction which was never complained of before. It was also alleged that the respondent was also negligent in not retaining the money but released it to the 2nd defendant. In my view there was no negligence because the respondent when the money was released though a few days before the execution of the sale and purchase agreement because the sale and purchase agreement was concluded only a few days later. I will hold the respondent negligent if he had retained the money until now. It was alleged that the respondent was negligent in asking from the appellant the cost of stamp duty on the transfer form to be executed to be done later. With the greatest respect to the Counsel for the appellant no such evidence had ever been adduced in the Lower Court. I was not able to find that evidence in the notes of evidence.

From the above, I am of the view that there was no negligence on the part of the respondent. That being the case, I dismiss the appeal with costs.

Also found at [1990] 2 CLJ 780